

1 Douglas J. Rovens (SBN 106582)

2 drovens@rovenslamb.com

3 Steven A. Lamb (SBN 132534)

4 slamb@rovenslamb.com

5 ROVENS LAMB LLP

6 1500 Rosecrans Avenue, Suite 418

7 Manhattan Beach, California 90266

8 Telephone: 310.536.7830

9 Facsimile: 310.872.5489

10 Attorneys for Defendant and Counterclaimant

11 MICRO-TENDER INDUSTRIES, INC.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

GLOBAL FOOD INNOVATIONS,
INC., a Delaware Corporation,

Plaintiff,

vs.

WESTERN PROPERTY
MANAGEMENT, LLC, a Nevada
limited liability company; MARC
MIRO, an individual; JACK WISE, an
individual; JEFFREY COVEY, an
individual; GERALD NORMAN, an
individual; JAMES TERAN, an
individual; SOLID GOLD FOODS,
INC., a Delaware corporation;
COMMERCIAL INTERNATIONAL
CORPORATION, a Delaware
corporation; MICRO-TENDER
INDUSTRIES, INC., a Delaware
corporation; and DOES 1 through 10,
inclusive,

Defendants.

Case No: 2:15-cv-00881 FMO (AGRx)

Hon. Fernando M. Olguin

**OPPOSITION BY MICRO-
TENDER INDUSTRIES, INC. TO
GLOBAL FOOD INNOVATION,
INC.'S MOTION TO DISMISS
COUNTERCLAIM**

[Declaration of Douglas J. Rovens
Filed Concurrently]

Date: July 30, 2015
Time: 10:00 a.m.
Courtroom: 22 (5th Floor)

Complaint Filed: February 6, 2015
FAC Filed: April 24, 2015
Trial Date: May 17, 2016

TABLE OF CONTENTS

1		
2	I.	INTRODUCTION..... 1
3	II.	THE COURT SHOULD DENY PLAINTIFF’S MOTION AS
4		PROCEDURALLY DEFICIENT BECAUSE PLAINTIFF’S COUNSEL
5		VIOLATED LOCAL RULE 7-3 AND FILED ITS ANSWER TO THE
6		COUNTERCLAIM AT THE SAME TIME IT FILED ITS MOTION IN
7		VIOLATION OF FED. R. CIV. P. 12 2
8	A.	Plaintiff Violated The Meet and Confer Requirements of Local
9		Rule 7-3 2
10	B.	Plaintiff Violated Fed. R. Civ. P. 12 (b) By Filing Its Motion To
11		Dismiss At The Same Time It Answered Micro-Tender’s
12		Counterclaim 4
13	III.	THE MOTION TO DISMISS FAILS TO ESTABLISH ANY BASIS
14		FOR DISMISSAL OF THE COUNTERCLAIM 4
15	A.	Relevant Facts 4
16	B.	Standard of Review 5
17	C.	GFI Fails To Show Any Defect In The Counterclaim On The Basis
18		That The Patent Agreement Is “Illegal” 6
19	1.	<i>The Patent Agreement Is Not “Per Se Unlawful” Because</i>
20		<i>Under The Patent Code The Pork Tenderization Patent Was</i>
21		<i>Enforceable During The Gap Period Prior To The USPTO’s</i>
22		<i>Acceptance Of Late Payment Of Maintenance Fees 6</i>
23	2.	<i>Plaintiff Cannot Now Contend That The Patent Agreement Is</i>
24		<i>Unenforceable Because Of The Alleged Failure To Pay</i>
25		<i>Maintenance Fees 8</i>
26	D.	Plaintiff’s Motion Ignores That Even If The Patent Agreement Was
27		“Per Se Unlawful” After 2012, Which Was Not, Micro-Tender’s
28		Counterclaim Still Survives Dismissal 10
	IV.	IF THE COURT IS INCLINED TO GRANT THE MOTION, MICRO-
		TENDER REQUESTS LEAVE TO AMEND 10
	V.	CONCLUSION 11

TABLE OF AUTHORITIES

Cases

<i>Ashcroft. v. Iqbal</i> (2009) 556 U.S. 662.....	6
<i>Beery v. Hitachi Home Electronics (America), Inc.</i> (C.D. Cal. 1993) 157 F.R.D. 477.....	4
<i>Bell Atl. Corp. v. Twombly</i> (2007) 550 U.S. 544.....	6
<i>Brown v. Elec. Arts, Inc.</i> (9th Cir. 2013) 724 F.3d 1235.....	5
<i>Brulotte v. Thys Co.</i> (1964) 379 U.S. 29	8, 10
<i>Cahill v. Liberty Mut. Ins. Co.</i> (9th Cir.1996) 80 F.3d 336.....	5
<i>Chang v. Chen</i> (9th Cir.1996) 80 F.3d 1293	6
<i>Conley v. Gibson</i> (1957) 355 U.S. 41.....	6
<i>Davis v. Chase Bank U.S.A.</i> (C.D. Cal. 2009) 650 F. Supp. 2d 1073	10
<i>Kimble v. Marvel Entertainment, LLC</i> (S. Ct. – No. 13-720, 2015 WL 2473380, *10 (June 22, 2015)	8, 10
<i>Lizalde v. Advance Planning Serv's, Inc.</i> (S.D. Cal. 2012) 875 F.Supp.2d 1150	9
<i>Owens v. County of Los Angeles</i> (2013) 220 Cal.App.4th 107	8
<i>Pareto v. F.D.I.C.</i> (9th Cir. 1998) 139 F.3d 696.....	5
<i>Ross v. Pioneer Life Ins. Co.</i> (C.D. Cal. 2008) 545 F. Supp. 2d 1061	10

Statutes

35 U.S.C 41(c)	7
Fed. R. Civ. P. 12(b)(6)	3, 4

Rules

USDC Calif. Local Rule 7-3.....	2, 3
---------------------------------	------

1 **I. INTRODUCTION**

2 The Motion by plaintiff Global Food Innovations, Inc. (“Plaintiff” or “GFI”)
3 to Dismiss Micro-Tender, Inc.’s Counterclaim is deficient in all respects. Plaintiff
4 failed to comply with the meet and confer requirements of Local Rule 7-3, and then
5 filed the Motion concurrently with its answer to Micro-Tender’s counterclaim in
6 violation of Federal Rule of Civil Procedure 12. These defects alone justify the
7 Court’s denial of the Motion. In addition, even if the Court considers the
8 improperly filed Motion, the result still should be denial of the Motion because
9 Plaintiff fails to show any basis for the Court to dismiss the Counterclaim.

10 First, Plaintiff’s Motion is deficient because GFI’s sole argument that the
11 patent license agreement between Micro-Tender and GFI (“Patent Agreement”) is
12 “per se unlawful,” is contrary to the provisions of the Patent Code (Title 35 of the
13 United States Code) and not justified under the Supreme Court precedent cited in its
14 Motion. Second, the Motion fails to come to grips with the facts that (1) Plaintiff
15 used and relied on the license granted in the Patent Agreement and (2) sued Micro-
16 Tender for relief under the very agreement it now seeks to claim is “unlawful.”
17 Third, even if the Court was to determine that the Patent Agreement was “per se
18 unlawful” after December 2012, the Counterclaim still states a claim for breach of
19 contract because Micro-Tender alleges that Plaintiff periodically failed to make the
20 required royalty payments between 2004 and 2015, when Plaintiff sued Micro-
21 Tender. The Court should deny Plaintiff’s Motion to Dismiss.

1 **II. THE COURT SHOULD DENY PLAINTIFF’S MOTION AS**
 2 **PROCEDURALLY DEFICIENT BECAUSE PLAINTIFF’S COUNSEL**
 3 **VIOLATED LOCAL RULE 7-3 AND FILED ITS ANSWER TO THE**
 4 **COUNTERCLAIM AT THE SAME TIME IT FILED ITS MOTION IN**
 5 **VIOLATION OF FED. R. CIV. P. 12**

6 **A. Plaintiff Violated The Meet and Confer Requirements of Local**
 7 **Rule 7-3**

8 Local Rule 7-3 of the Central District of California requires attorneys to meet
 9 and confer about anticipated motions at least 7 days in advance of filing the motion:

10 L.R. 7-3 Conference of Counsel Prior to Filing of Motions. In all cases . . .
 11 counsel contemplating the filing of any motion shall first contact
 12 opposing counsel to discuss thoroughly, preferably in person, the
 13 substance of the contemplated motion and any potential resolution.
 14 The conference shall take place at least seven (7) days prior to the
 15 filing of the motion.

16 Plaintiff’s counsel claims that it satisfied this requirement because on June 8,
 17 2015, counsel “discussed a proposed mutual dismissal and tolling agreement” to
 18 which counsel for Micro-Tender never responded and then requested to complete a
 19 conference on June 18, 2015. (Notice of Motion at i:17- ii:3.) The communications
 20 described in Plaintiff’s Motion, however, did not satisfy the Local Rule.

21 On June 18, 2015, the very day GFI’s response to Micro-Tender’s
 22 Counterclaim was due, Plaintiff’s counsel requested an extension within which to
 23 file GFI’s responsive pleading. In connection with GFI’s requested extension,
 24 Plaintiff’s counsel concealed its intention to file a motion to dismiss. [Declaration
 25 of Douglas J. Rovens (“Rovens Decl.”) ¶ 4.] This was the second extension
 26 provided by Micro-Tender’s counsel. In connection with the initial extension,
 27 Micro-Tender’s counsel inquired whether GFI intended to file a motion to dismiss
 28 the Counterclaim and was told that GFI had not made a decision in that regard.
 (Rovens Decl. ¶ 3.)

1 The first mention ever by Plaintiff's counsel of a motion to dismiss was in an
2 email *after* Plaintiff's counsel secured a second extension. Plaintiff's counsel sent a
3 draft stipulation to extend the time to respond to the Counterclaim from June 18
4 until June 22, 2015, and in that email asked for a Local Rule 7-3 meeting to discuss
5 a motion to dismiss the Counterclaim. The request to meet and confer late in the
6 afternoon on Thursday, June 18, 2015, after securing the second extension certainly
7 clearly was untimely because GFI's responsive pleading was due the following
8 Monday, June 22, 2015, and Plaintiff's counsel had no excuse for the delay.
9 Plaintiff's counsel's securing of an extension to respond to Micro-Tender's
10 Counterclaim on the day it was due, without also disclosing to Micro-Tender's
11 counsel that GFI intended to file a motion to dismiss, was dissembling. (Rovens
12 Decl. ¶ 5.) Micro-Tender's counsel promptly notified Plaintiff's counsel that
13 pursuant to Local Rule 7-3 any meeting to discuss GFI's motion to dismiss should
14 have occurred the prior Monday and to request such a meeting late Thursday
15 afternoon when GFI's responsive pleading would have been due that same day, but
16 for the extension to which Micro-Tender's counsel had just agreed, was not proper.
17 With respect to the proposed "mutual dismissal and tolling agreement," which
18 Plaintiff's counsel claims was the initiation of a Local Rule 7-3 meeting, Plaintiff's
19 attorneys never mentioned that GFI intended to file a motion to dismiss, or asserted
20 that Micro-Tender's breach of contract claim was deficient as pled. (Rovens Decl.
21 ¶¶ 5, 6.) Therefore, that proposal was totally unrelated to any motion to dismiss the
22 Counterclaim. The Court should deny the motion for failing to comply with Local
23 Rule 7-3.

1 **B. Plaintiff Violated Fed. R. Civ. P. 12 (b) By Filing Its Motion To**
 2 **Dismiss At The Same Time It Answered Micro-Tender's**
 3 **Counterclaim**

4 At Plaintiff's counsel's request, Micro-Tender's counsel granted two
 5 extensions for Plaintiff to respond to Micro-Tender's Counterclaim. The second
 6 extension required Plaintiff to respond to the Counterclaim by June 22, 2015.
 7 (Rovens Decl. ¶ 2.) On June 22nd Plaintiff filed both a motion to dismiss pursuant to
 8 Fed. R. Civ. P. 12(b)(6) (Doc. No. 78) and an answer with affirmative defenses to
 9 the Counterclaim (Doc. No. 80).

10 Plaintiff, however, was required to file its motion to dismiss in lieu of its
 11 answer. Fed. R. Civ. P. 12 (b) provides that certain defenses, including a Rule
 12 12(b)(6) failure to state a claim defense, must be asserted as an affirmative defense
 13 in a responsive pleading (if one is required), or at the election of the party, such
 14 defenses may be made by motion. If, however, a party elects to make a 12(b)
 15 motion, such "motion asserting any of these defenses must be made before pleading
 16 . . . ¹" This means that a party cannot answer a pleading then make a Fed. R. Civ. P.
 17 12(b)(6) motion as Plaintiff has done here. Therefore, Plaintiff's motion should be
 18 denied as untimely.

19 **III. THE MOTION TO DISMISS FAILS TO ESTABLISH ANY BASIS**
 20 **FOR DISMISSAL OF THE COUNTERCLAIM**

21 **A. Relevant Facts**

22 Although Plaintiff's case summary recites several pages of allegations and
 23 procedural history, the pertinent allegations of the Counterclaim necessary for the
 24 Court's consideration of the Motion are few and simple:

25 _____
 26 ¹ The Motion was filed in contravention of "the law of the 9th Circuit"
 27 requiring a motion to dismiss to be filed before an answer. *Beery v. Hitachi Home*
 28 *Electronics (America), Inc.* (C.D. Cal. 1993) 157 F.R.D. 477, 479.

1 • On or about April 30, 2004, Micro-Tender and GFI entered into an
2 agreement licensing certain patents for the tenderization of meat, pork, and poultry
3 for use by GFI (the “Patent Agreement”). [Counterclaim ¶ 5 (Doc. No. 52).]

4 • Included among the licensed patents was patent number: US6814989
5 B2 (“Pork Tenderization Patent”). (*Id.*)

6 • Section 3.1(b) of the Patent Agreement requires GFI to pay Micro-
7 Tender a monthly royalty payment for the entire term of the agreement. (*Id.* ¶ 6.)

8 • The Patent Agreement expired upon the “termination of the Agreement
9 or the expiration of the last to expire of the Licensed Patents.” (*Id.* ¶ 8.)

10 • The Pork Tenderization Patent is not expired and is still a live,
11 enforceable patent. [*Id.* and GFI’s Request for Judicial Notice (“RJN”) (Doc. No.
12 79) at Ex. 1.] US6814989 B2 expired for non-payment of fees in 2012, but was
13 revived when the late payment of fees was accepted by the USPTO in October 2014.
14 (RJN, at Ex. 1.)

15 • GFI periodically failed to make the minimum royalty payments under
16 the Patent Agreement between 2004 and 2015. (*Id.* ¶ 11.)

17 • GFI entirely ceased to make royalty payments after January 2015. (*Id.* ¶
18 10.)

19 **B. Standard of Review**

20 In ruling on a motion to dismiss under Rule 12(b)(6), the Court must assume
21 the truth of all factual allegations and must construe them in the light most favorable
22 to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.* (9th Cir.1996) 80 F.3d 336,
23 337-38. The Court also must accept as true all reasonable inferences to be drawn
24 from the material allegations in the complaint. *See Brown v. Elec. Arts, Inc.* (9th Cir.
25 2013) 724 F.3d 1235, 1247-48; *Pareto v. F.D.I.C.* (9th Cir. 1998) 139 F.3d 696,
26 699. Rule 8(a)(2) requires only “a short and plain statement of the claim showing
27 that the pleader is entitled to relief” in order to “give the defendant fair notice of
28

1 what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
 2 *Twombly* (2007) 550 U.S. 544, 555 (quoting *Conley v. Gibson* (1957) 355 U.S. 41,
 3 47). A claim has “facial plausibility when the plaintiff pleads factual content that
 4 allows the court to draw the reasonable inference that the defendant is liable for the
 5 misconduct alleged.” *Ashcroft. v. Iqbal* (2009) 556 U.S. 662, 678. “The plausibility
 6 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer
 7 possibility that a defendant has acted unlawfully.” *Id.*

8 Additionally, where a motion to dismiss is granted, a district court should
 9 provide leave to amend unless it is clear that the complaint could not be saved by
 10 any amendment. *See Chang v. Chen* (9th Cir.1996) 80 F.3d 1293, 1296.

11 C. **GFI Fails To Show Any Defect In The Counterclaim On The Basis**
 12 **That The Patent Agreement Is “Illegal”**

13 The solitary basis for Plaintiff’s motion to dismiss is its contention that as of
 14 December 10, 2012, the Patent Agreement expired because the Pork Tenderization
 15 Patent expired; and, as a result, the Patent Agreement became “*per se unlawful*.”
 16 The Motion fails to make this showing and, moreover, is inconsistent with the
 17 parties’ conduct under the Patent Agreement.

18
 19 ***1. The Patent Agreement Is Not “Per Se Unlawful” Because Under***
 20 ***The Patent Code The Pork Tenderization Patent Was Enforceable***
 21 ***During The Gap Period Prior To The USPTO’s Acceptance Of***
Late Payment of Maintenance Fees

22 There is no basis to hold the Patent Agreement unlawful. The Patent Code
 23 provides that Plaintiff could rely on, use, and enforce the Pork Tenderization Patent
 24 during the period between the due date for which maintenance fees were not paid
 25 and when the United States Patent and Trademark Office (“USPTO”) accepted the
 26 late payment of fees.

1 35 U.S.C 41(c)(1) provides that the USPTO “may accept the payment of any
 2 maintenance fee required by subsection (b) after the 6-month grace period if the
 3 delay is shown to the satisfaction of the Director to have been unintentional. . .”
 4 Subsection (c)(2) provides that if such late payment is accepted after the “6-month
 5 grace period,” the patent remains enforceable and protectable during entire period :

6 . . . A patent, the term of which has been maintained as a result
 7 of the acceptance of a payment of a maintenance fee under this
 8 subsection, shall not abridge or affect the right of any person or
 9 that person’s successors in business who made, purchased,
 10 offered to sell, or used anything protected by the patent within
 11 the United States, or imported anything protected by the patent
 12 into the United States after the 6-month grace period but prior
 13 to the acceptance of a maintenance fee under this subsection, to
 14 continue the use of, to offer for sale, or to sell to others to be
 15 used, offered for sale, or sold, the specific thing so made,
 16 purchased, offered for sale, used, or imported. The court before
 17 which such matter is in question may provide for the continued
 18 manufacture, use, offer for sale, or sale of the thing made,
 19 purchased, offered for sale, or used within the United States, or
 20 imported into the United States, as specified, or for the
 21 manufacture, use, offer for sale, or sale in the United States of
 22 which substantial preparation was made after the 6-month grace
 23 period but before the acceptance of a maintenance fee under
 24 this subsection, and the court may also provide for the
 continued practice of any process that is practiced, or for the
 practice of which substantial preparation was made, after the 6-
 month grace period but before the acceptance of a maintenance
 fee under this subsection, to the extent and under such terms as
 the court deems equitable for the protection of investments
 made or business commenced after the 6-month grace period
 but before the acceptance of a maintenance fee under this
 subsection.

25 In short, in this case, during the period from December 10, 2012, until October 7,
 26 2014, Plaintiff was entitled to “ma[k]e, purchase[], offer[] to sell, or use[] anything
 27 protected by the [Pork Tenderization Patent] within the United States. . .” as it did
 28

1 under the Patent Agreement because the PTO accepted the late payment of fees for
 2 maintenance of the Pork Tenderization Patent on October 7, 2014. [RJN (Doc. 79)
 3 Ex. 1.] Plaintiff cannot both rely on the continued validity of the Pork Tenderization
 4 Patent to make, purchase, offer, sell, or use products licensed under the Patent
 5 Agreement, while at the same time disaffirming the term of the Patent Agreement to
 6 avoid paying the royalties due.

7 *Kimble v. Marvel Entertainment, LLC* (S. Ct. – No. 13-720, 2015 WL
 8 2473380, *10 (June 22, 2015) (“*Marvel*”), on which Plaintiff relies, does not change
 9 this analysis or result. *Marvel* and its predecessor in the Supreme Court, *Brulotte v.*
 10 *Thys Co.* (1964) 379 U.S. 29, hold “that post-patent royalty contracts are
 11 unenforceable. . .” *Marvel* *10. *Marvel* confirmed, through a grant of declaratory
 12 relief, that the term of a royalty agreement for a patent could not be continued past
 13 the patentable life of the patent subject to the agreement. By contrast neither
 14 *Marvel*, *Brulotte*, nor the published decisions in between address themselves to the
 15 facts of this case: namely, a licensee’s attempt to cut short the term of a patent
 16 agreement because of a failure to pay maintenance fees for an otherwise enforceable
 17 and protectable patent, *after* the patent was properly revived under the Patent Code.
 18 The Patent Agreement is not “a post-patent royalty contract” proscribed by *Brulotte*
 19 and its progeny because the Pork Tenderization Patent is an enforceable patent, and
 20 has been so for the entire period since the beginning of the Patent Agreement. For
 21 this reason alone, Plaintiff’s Motion to Dismiss should be denied.

22 ***2. Plaintiff Cannot Now Contend That The Patent Agreement Is***
 23 ***Unenforceable Because Of The Alleged Failure To Pay***
 24 ***Maintenance Fees***

25 In addition to the fact that Plaintiff’s Motion to Dismiss is contradicted by the
 26 express provisions of the Patent Code, Plaintiff’s Motion is contradicted by its own
 27 conduct, including the allegations of its breach of contract claim in the original and
 28

1 First Amended Complaint. Plaintiff cannot profit from two “totally inconsistent”
 2 positions taken with respect to the Patent Agreement. *See e.g. Owens v. County of*
 3 *Los Angeles* (2013) 220 Cal.App.4th 107, 121 (discussing elements of judicial
 4 estoppel). Attempting to avoid Micro-Tender’s meritorious Counterclaim, however,
 5 Plaintiff has done exactly that.

6 First, Plaintiff expressly alleges in the First Amended Complaint (and in its
 7 original complaint) that, consistent with Micro-Tender’s disclaimer of responsibility
 8 for paying maintenance fees under Section 5.2 of the Patent Agreement, it undertook
 9 to pay the “maintenance fees associated with the patents” *See e.g. FAC* ¶ 46 (Doc.
 10 No. 45). Now, in light of Plaintiff’s failure to timely pay sufficient maintenance
 11 fees to maintain all the licensed patents, Plaintiff seeks to capitalize on its failure by
 12 avoiding its obligations under its contract with Micro-Tender. Such conduct is
 13 clearly inconsistent with the established expectations of the parties and Plaintiff
 14 cannot profit from it.

15 Second, Plaintiff’s First Amended Complaint also expressly alleges and seeks
 16 to recover under a term of the Patent Agreement that it deliberately misread to
 17 impose a duty on Micro-Tender to pay maintenance fees. *FAC* ¶¶ 133-136 (Doc.
 18 No. 45). Putting aside that Plaintiff’s First Amended Complaint is subject to
 19 dismissal because no such duty existed under the plain language of the Patent
 20 Agreement – the position that it can sue under the Patent Agreement is totally
 21 inconsistent with the position in the Motion that the Patent Agreement is “per se
 22 unlawful.” (Motion Part C.)

23 In any event, even if the Court decides this is an issue of how and whether the
 24 Patent Agreement should be interpreted and enforced, on a motion to dismiss a
 25 district court does not “definitively interpret the contracts or identify any
 26 ambiguities that might [] require the introduction of extrinsic evidence.” *Lizalde v.*
 27 *Advance Planning Serv’s, Inc.* (S.D. Cal. 2012) 875 F.Supp.2d 1150, 1161 & n.7;

1 *Davis v. Chase Bank U.S.A.* (C.D. Cal. 2009) 650 F. Supp. 2d 1073, 1088 (finding
2 plaintiff stated claim for breach of contract sufficient to survive motion to dismiss).

3 **D. Plaintiff's Motion Ignores That Even If The Patent Agreement**
4 **Was "Per Se Unlawful" After 2012, Which It Was Not, Micro-**
5 **Tender's Counterclaim Still Survives Dismissal**

6 Plaintiff's Motion inappropriately assumes that the breach of contract claim
7 only addresses itself to Plaintiff's failure to make payments from February 2015 to
8 the present. (*See Motion passim.*) The Counterclaim also alleges, however, that
9 Plaintiff failed to make the royalty payments due under the Patent Agreement
10 between 2004 and 2015. Counterclaim ¶ 11 (Doc. No. 52). Thus, even if Plaintiff is
11 correct about the effect of *Brulotte* and *Marvel* on the Patent Agreement, which it is
12 not, Micro-Tender still is owed all missed royalty payments due between May 2011
13 and December 2012. Plaintiff simply has ignored this point and, thus, fails to
14 establish any basis for granting its Motion to Dismiss.

15 **IV. IF THE COURT IS INCLINED TO GRANT THE MOTION, MICRO-**
16 **TENDER REQUESTS LEAVE TO AMEND**

17 In the Ninth Circuit, "[l]eave to amend is liberally allowed." *Ross v. Pioneer*
18 *Life Ins. Co.* (C.D. Cal. 2008) 545 F. Supp. 2d 1061, 1064. In this case, Micro-
19 Tender should be given the opportunity to file an amended counterclaim as a matter
20 of course because Micro-Tender has not yet amended. Moreover, leave to amend is
21 justified in light of the fact that Micro-Tender will be able, as appropriate, to allege
22 additional facts regarding (a) GFI's use and reliance on the enforceability of the
23 Pork Tenderization Patent throughout the life of the Patent Agreement, including
24 between 2012 and 2015; (b) its breach of the covenant of good faith and fair dealing
25 by failing to pay patent maintenance fees; (c) the course of the parties' dealings
26 regarding maintenance payments for the licensed patents; and (d) more specific facts

1 about the dates and time Plaintiff failed to make royalty payments in the period
2 between May 2011 and December 2012.

3 **V. CONCLUSION**

4 Because Plaintiff failed to meet its burden to show a basis to dismiss Micro-
5 Tender's Counterclaim under the Patent Agreement, the Patent Code, or the claims
6 as pled in the Counterclaim, the Court should deny the Motion. Alternatively,
7 Micro-Tender should be allowed leave to amend.

8
9 Dated: July 9, 2015

ROVENS LAMB LLP

10
11 By: /S/ Douglas J. Rovens
12 DOUGLAS J. ROVENS
13 Attorneys for Defendant and
14 Counterclaimant MICRO-
15 TENDER INDUSTRIES, INC.
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE***Global Food Innovations, Inc. v. Western Property Management, LLC, et al.***

USDC, Central District of California, Western Division

Case No. 2:15-cv-00881-FMO-AGR

STATE OF CALIFORNIA)

COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1500 Rosecrans Avenue, Ste. 418, Los Angeles, California 90266.

On July 9, 2015, I served the following document(s): **OPPOSITION BY MICRO-TENDER INDUSTRIES, INC. TO GLOBAL FOOD INNOVATION, INC.'S MOTION TO DISMISS COUNTERCLAIM** on the interested parties on the attached service list as follows:

(X) BY U.S. MAIL (indicated parties only): I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. I caused the above-referenced document to be mailed to counsel at the addresses listed above.

() (BY ELECTRONIC MAIL): I hereby certify that I served the above-described document on the interested parties in this action by attaching an electronic copy of that document to an e-mail addressed to the parties listed herein at their most recent e-mail address of record in this action. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

(X) CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

1 () **BY OVERNIGHT COURIER:** I caused the above-referenced
2 document(s) to be delivered to an overnight courier service (Federal
3 Express/California Overnight Courier), for delivery to the above address(es) and
4 requested the delivery receipt.

5 () **BY FACSIMILE:** I caused the above-referenced documents(s) to be
6 transmitted to the noted addressee(s) at the fax number as stated.

7 Executed on July 9, 2015 at Los Angeles, California.

8 (X) **FEDERAL:** I declare under penalty of perjury under the laws of the United
9 States of America that the foregoing is true and correct.

10 /S/ Tammy Cortez

11 Tammy Cortez
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST

Global Food Innovations, Inc. v. Western Property Management, LLC, et al.

Alan K. Steinbrecher Attorneys for Plaintiff, Global Food
Geoffrey T. Stover Innovations, Inc.

STEINBRECHER & SPAN LLP
445 S. Figueroa St., Suite 2230
Los Angeles, CA 90071
asteinbrecher@steinbrecherspan.com
gstover@steinbrecherspan.com

Glenn J. Plattner Attorneys for Defendants, Western
Keith D. Klein Property Management, LLC and
David Harford Gerald Norman

BRYAN CAVE LLP
120 Broadway, Suite 300
Santa Monica, CA 90401
glenn.plattner@bryancave.com
keith.klein@bryancave.com
david.harford@bryancave.com

Aaron Berger Attorney for Defendant, Marc Miro
LAW OFFICES OF
AARON BERGER
4338 1-2 Laurel Canyon Blvd.
Studio City, CA 91604
airberger@gmail.com

David M. Berger Attorney for Defendant, Marc Miro
DAVID M. BERGER
LAW OFFICES
9430 Olympic Blvd., Suite 400
Beverly Hills, CA 90212

Jack Wise In Pro Per Defendant, Jack Wise
375 W. Bedford Ave., Suite 101
Fresno, CA 93711
jack_omundo@yahoo.com

SERVED BY MAIL ONLY

1 Byeongsook Seo
2 GORDON AND REES LLP
3 555 Seventeenth St., Suite 3400
4 Denver, CO 80202
bseo@gordonrees.com

Attorney for Defendants, Solid Gold
Foods and James Teran

5 A. Louis Dorny
6 GORDON AND REES LLP
7 633 West Fifth St., 52nd Floor
8 Los Angeles, CA 90071
ldorny@gordonrees.com

Attorney for Defendants, Solid Gold
Foods and James Teran

9 Jeff Reich, Esq.
10 The Reich Law Firm
11 8441 N. Millbrook Ave., Ste. 104
12 Fresno, CA 93705
13 Phone: (559) 440-1191
14 Fax: (559) 432-9092
15 Email: jreich@reichlaw.com

Attorney for Defendant Jeffrey Covey

14 Shane Reich, Esq.
15 The Reich Law Firm
16 8441 N. Millbrook Ave., Ste. 104
17 Fresno, CA 93705
18 Phone: (559) 440-1191
19 Fax: (559) 432-9092

SERVED BY MAIL ONLY